IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5344

JAMES RAYMOND MOORE,

Petitioner,

v.

ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

Petitioner James R. Moore was denied a writ of Habeas Corpus by the United States District Court for the Northern District of Illinois for failure to exhaust state remedies, in an unpublished Memorandum of Decision, entered on March 20, 1974. The United States Court of Appeals for the Seventh Circuit vacated the order of the District Court and remanded for further proceedings, order entered on August 7, 1974.

On June 5, 1975, the United States District Court for the Northern District of Illinois granted the Respondent's Motion for Summary Judgment, Memorandum and order entered on June 5, 1975. The United States Court of Appeals for the Seventh Circuit affirmed, in an unpublished order entered on April 27, 1976.

The Illinois Supreme Court had affirmed Petitioner's conviction on April 6, 1972, in *People v. Moore*, 51 Ill.2d 79, 281 N.E.2d 294 (1972).

JURISDICTION

The judgment of the Court of Appeals, which affirmed the denial of a writ of Habeas Corpus, was entered on April 27, 1976. (Appendix C of Petition for Certiorari.) On June 10, 1976, the Court of Appeals denied a Petition for Rehearing *en banc*. The Petition for a Writ of Certiorari was filed on September 8, 1976, and granted on January 17, 1977.

The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

28 U.S.C. §2254(a)

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Sixth Amendment to the Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment to the Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED

I. Whether the Petitioner was entitled to have Counsel appointed and present at a pretrial confrontation with the sole eyewitness, which took place after the formal judicial proceedings had begun.

II. Whether the Petitioner was denied due process by the admission at trial of in-court identifications

derived from an unnecessarily and impermissibly suggestive one-on-one confrontation with the sole eyewitness, where there was no adequate independent origin for the identifications.

III. Whether, in a criminal case involving a substantial likelihood of misidentification, it was prejudicial error to deny transcripts of all proceedings wherein the Petitioner, an indigent defendant, was identified by the sole adversarial eyewitness.

STATEMENT

A. Procedural History

After a jury trial, Petitioner James R. Moore was convicted in August, 1968 of rape, robbery, burglary and deviate sexual assault; he was sentenced to three concurrent terms of 30 to 50 years, and one of 5 to 10 years. The Supreme Court of Illinois affirmed the conviction. *People v. Moore*, 51 Ill.2d 79. The Petitioner filed, *pro se*, a petition for writ of habeas corpus in the Northern District of Illinois; his petition was dismissed for failure to exhaust State remedies but was reinstated by the United States Court of Appeals for the Seventh Circuit, on August 7, 1974.

In November of 1974, the Prison Legal Services Project began representation of Petitioner in the District Court, where the Respondent's motion for summary judgment was granted in June, 1975. (Memorandum of Decision) No evidentiary hearing was ordered.

The Seventh Circuit affirmed in an "Unpublished Order," dated April 27, 1976, holding that the District Judge had not erred in refusing to apply the *Wade-Gilbert* exclusionary rule. (Unpublished Order, p. 9)

On September 8, 1976, Petitioner sought this Court's review of the Seventh Circuit's decision, and certiorari was granted on January 17, 1977.

B. Statement of the Facts

The essential facts regarding the identification of Petitioner, James R. Moore, are derived from his State court trial transcript, made a part of the Record before this Court. There was no evidentiary hearing held in the District Court.

At about 12:00 or 12:15 p.m. on December 14, 1967, Marilyn Miller was awakened by some noise in her apartment. (Tr. 211) She had been lying in bed asleep for approximately a half hour (Tr. 263), when she opened her eyes and saw a man with a knife, standing in her bedroom doorway. (Tr. 211)

There was no artificial lighting in the apartment at that time (Tr. 263), and both bedroom windows were covered. (Tr. 264, 304)

In the next 10 or 15 seconds, she screamed and started struggling to get out of bed, but her feet got caught in the bedclothes. (Tr. 212-214) That 10 to 15 second period was her only opportunity to see the intruder's face. (Tr. 215) At all times thereafter, he was wearing a bandana on his face (Tr. 264), and her own eyes were covered. (Tr. 218) Marilyn Miller was sexually assaulted, and the man left without ever removing his mask. (Tr. 220-221, 265)

Marilyn Miller, a white woman, could not remember, either at the Motion to Suppress hearing or at the trial, whether she had described the assailant to the first police officer she saw. (Tr. 105, 226) However, that

police officer testified that she had told him she was attacked by a large Negro man wearing a yellow sweater. (Tr. 324) The Police Officer completed his report with his own estimates of the assailant's height and weight. (Tr. 325)

Later that day, the complainant gave another description to a different police officer, in which she added that the assailant had facial hair. (Tr. 105)

According to her testimony, the third or fourth time Marilyn Miller gave a description, she told two detectives that she believed the assailant was a man she had seen in a bar the night before. (Tr. 107) The official police report prepared by the detectives, however, does not show that Ms. Miller ever made this statement. (Tr. 404)[1]

Two days after the assault, Marilyn Miller was unable to identify the assailant from a photographic display of some two hundred (200) pictures. (Tr. 110) The next week, police arranged a second photograph spread containing seven (7) to 12 pictures. (Tr. 421) The police did not mark any of these pictures; the exact number which Marilyn Miller saw is unknown. (Tr. 42, 111, 145)

By the time of the second photographic viewing, the police had investigated the ownership of a small blue plastic book or folder which Marilyn Miller had given them on December 14, 1967. (Tr. 391) Some time after she was attacked that day, the complainant had picked up what she thought was her black plastic checkbook,

[1] The man she had seen the night before was James R. Moore. (Tr. 115-117) The two had a brief conversation about 10:00 p.m. on December 13, 1967. (Tr. 120) They did not exchange names or addresses. (Tr. 118)

but on looking more closely she realized it did not belong to her. (Tr. 223-224) At that point, she called the police to report the sexual assault, and gave the blue plastic book to the first officer who arrived. (Tr. 226)

Some time between Thursday, December 14, 1967, and the following Monday or Tuesday, the police discovered that the blue plastic book or folder belonged to James R. Moore. (Tr. 391) Testimony from two witnesses at trial related that time on the night of December 13, 1967, Petitioner had been around the bar where Marilyn Miller had seen him, searching for "kind of a book" which he never found that night. (Tr. 505-506)

The police placed Petitioner's picture among the second group of photographs shown to the complainant. (Tr. 421) It was the only picture which showed a black man with a beard. (Tr. 157) Marilyn Miller selected this picture. (Tr. 111, 156) This identification was tentative, according to police; the complainant expressed a wish to see a suspect in person. (Tr. 156)

On December 20, 1967, police arrested James R. Moore at home. (Tr. 80) He remained in custody over night and was taken to court on December 21, 1967, for his first preliminary hearing. (Tr. 80) On the day of the hearing, Marilyn Miller was brought to the courtroom by one of the investigating officers in the case. (Tr. 232) This detective asked her to sign a complaint naming James R. Moore as her assailant. (Tr. 287) When she questioned this procedure, the policeman told her it made no difference. (Tr. 287)

The complaining witness knew that she had been brought to the courtroom in order to identify a

suspect. (Tr. 279) When James Moore's name was called, she recognized the name from the complaint she had been asked to sign. (Tr. 287) Then, Mr. Moore, the defendant in the case, was brought out from custody (Tr. 281-282); he was not represented by counsel. (From transcript of the First preliminary hearing; hereinafter, "Pet. App. B")[2]

At this point, the judge called Marilyn Miller's name (Pet. App. B), and a State's Attorney motioned her up to the bench. (Tr. 280) After the judge had informed Defendant Moore of the charges against him, the prosecutor stated, in the presence of the complainant, that fingerprints had been found at the scene and certain of the complainant's property had been recovered from Petitioner's apartment, along with the clothing worn by the assailant. (Pet. App. B) The prosecutor then asked Marilyn Miller to identify her assailant. (Pet. App. B) She indicated the Defendant, James R. Moore.

At the trial, the State did not introduce the items referred to at the Petitioner's first preliminary hearing. (Transcript) The one fingerprint found at the scene was not James R. Moore's print. (Tr. 356)

On February 5, 1968, Petitioner's second preliminary hearing was held, at which the complainant identified Petitioner. (Transcript of February 5, 1968 hearing, p. 3) The judge found probable cause (Transcript of February 5, 1968, p. 11), and the grand jury indicted Petitioner for rape, robbery, burglary, and deviate sexual assault, on February 14, 1968, Indictment

[2] The Transcript of the first preliminary hearing was attached to the Petition for Certiorari as Appendix B. References to that transcript are made hereinafter as "Pet. App. B."

Number 68-549 (Tr. C-002) On April 5, 1968, the court appointed Frederick Cohn as counsel for Moore, an indigent defendant. (Tr. C-029) Moore's newly-appointed attorney made oral pre-trial motions for discovery and for free transcripts of the preliminary proceedings at which counsel had not been present. (Tr. 1-13) The trial court denied the request for preliminary hearing transcripts, saying that the Defendant was not entitled to them until the trial was in progress. (Tr. 11-13)

A hearing was held on Defendant's pre-trial Motion to Suppress Identification, and the Motion was denied. (Tr. 62-170) At no time during the Suppression hearing or during the trial did the Defendant or his appointed attorney ever see the transcripts of the preliminary proceedings. (Tr. 667-693, Affidavit in D. Ct.) At the trial, the complainant identified Mr. Moore as her assailant. (Tr. 213) The jury was given only one Instruction on eye-witness identification, that submitted by the State (Tr. 625), and Defendant was found guilty on all four counts of the indictment. (Tr. 655-656) He was sentenced to concurrent prison terms of 30-50 years, 30-50 years, 30-50 years, and 5-10 years. (Tr. 712-713)

Mr. Moore's conviction was affirmed by the Illinois Supreme Court which held, *inter alia*, that the denial of the transcripts to defendant, an indigent, violated the Equal Protection Clause but was harmless error, and that there was a basis for the eyewitness identification other than the December 21, 1967 confrontation. (*People v. Moore*, 51 Ill.2d 79, 281 N.E.2d 294 (1972))

Mr. Moore sought federal habeas corpus relief in the Northern District of Illinois, where the State's Motion for Summary Judgment was granted; the district judge

having found that the transcript denial was harmless error and that even though the confrontation procedure may have been suggestive, there was a sufficient independent origin for the identification. In purportedly following this Court's decision of *Neil v. Biggers*, 409 U.S. 188 (1972), the district court found it unnecessary to decide whether *Kirby v. Illinois*, 406 U.S. 682 (1972) would change the result. (Memorandum of Decision, p. 14)

On appeal, the United States Court of Appeals for the Seventh Circuit held that the writ was properly denied on the basis of harmless error, and the ruling in *Neil v. Biggers*, 409 U.S. 188 (1972). In addition, the Seventh Circuit held that *Kirby v. Illinois*, 406 U.S. 682 (1972) precluded the right to counsel at Defendant's admittedly suggestive confrontation proceeding, because such confrontation occurred before Defendant was indicated. (Unpublished Order)

The Court of Appeals further denied Defendant Moore a Rehearing en Banc, June 10, 1976, and this Court granted Petitioner's Writ of Certiorari on January 17, 1977.

SUMMARY OF ARGUMENT

I.

The right of the accused to have counsel present at a pretrial confrontation with an adversarial eyewitness attaches once the formal judicial proceedings have begun. The presence of defense counsel at that critical stage in the prosecution is necessary to protect against the introduction of impermissible suggestion, and to

preserve the accused's right to cross-examination of the eyewitness and to the effective assistance of counsel at trial.

A defendant who has been formally charged but not yet indicted is peculiarly vulnerable to the impermissibly suggestive procedure of presenting a single suspect to an eyewitness by means of a courtroom "showup." The informed presence of counsel is the only safeguard for a defendant who is subjected to such a one-on-one viewing by the adversarial eyewitness.

Because the holding of *Kirby v. Illinois*, 406 U.S. 682 (1972) does not preclude the right to the presence of counsel at an identification procedure which occurs after the prosecution has begun by way of formal charge or preliminary hearing, the Court of Appeals was incorrect in holding that the right to counsel did not attach until after "indictment." The admission at Petitioner's trial of all identification testimony which followed the confrontation, at which Petitioner was unrepresented by counsel was reversible error.

II.

A defendant who is subjected to an unnecessarily and impermissibly suggestive identification procedure which gives rise to a substantial likelihood of misidentification, is thereby deprived of due process, independently of any deprivation of the right to counsel at such a confrontation. The Court of Appeals correctly found that the one-on-one, courtroom presentation of Petitioner to the sole adversarial eyewitness was suggestive, but erroneously applied the "totality of circumstances" test and found the identification which derived from

the "showup" to have been reliable. The Court of Appeals should have applied a strict rule of exclusion to the identification evidence stemming from this unnecessarily and impermissibly suggestive post-*Stovall* confrontation, without regard to the reliability of such evidence, in order to preserve Petitioner's due process right to a fair trial.

Even if a strict exclusionary rule were not mandated in this case, the identification testimony should have been excluded because it was unreliable in the "totality of circumstances." The likelihood of substantial misidentification entered the case at the first, extremely limited opportunity of the witness to view the assailant, under poor lighting conditions. This harm was indicated by the witness' inability to provide more than a vague initial description of the assailant. The sequentially reinforcing elements of suggestivity had begun well before the ultimate courtroom "showup," thus the Court of Appeals erred in holding that there was an adequate independent basis for the witness' identifications.

Since Petitioner's conviction rested in large part on the sole eyewitness' identification testimony, and that testimony was tainted by a suggestive photographic procedure and a suggestive courtroom "showup," both of which created a substantial likelihood of misidentification, the Court of Appeals should have held that admission of that testimony at trial was reversible error.

III.

It is a denial of due process and equal protection not to provide appointed counsel with free transcripts of

the proceeding at which the indigent defendant was initially confronted by the sole adversarial eyewitness, and of the proceeding at which that witness again identified the defendant in court. Inasmuch as the attorney of a paying client could have obtained and utilized such transcripts in preparation for trial, and to perform meaningful cross-examination of the sole eyewitness at trial, Petitioner's appointed attorney should have been able to do likewise.

Since the question of Petitioner's guilt or innocence turned on the issue of identification, and his attorney was denied the use of transcripts containing critical identification testimony and the suggestive remarks made by the prosecutor at the confrontation proceeding, Petitioner was deprived of the effective assistance of counsel. Therefore, the Court of Appeals was incorrect in holding that the transcript denial had been harmless error.

ARGUMENT

I.

PETITIONER WAS ENTITLED TO HAVE AN ATTORNEY APPOINTED AND PRESENT AT HIS PRELIMINARY HEARING, BECAUSE IT WAS A CRITICAL STAGE OF THE PROSECUTION, AT WHICH MOORE WAS CONFRONTED BY THE ONLY ADVERSARIAL EYEWITNESS.

The Sixth Amendment to the United States Constitution guarantees that an accused person "need not stand alone against the State at any stage of the prosecution,

formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial" *United States v. Wade*, 388 U.S. 218, 226 (1967). Moreover, this Court has decreed that because pretrial confrontations between an accused and an eyewitness pose a grave potential for prejudice at trial, such a confrontation is a "critical stage," requiring the presence of counsel. *Id.* at 236-237 (1967) For without an attorney present to observe–and possible avert–any impermissible procedures employed by police and prosecutors, the accused has no means of preserving his right "to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." *Id.* at 226.

At the other end of the spectrum, this Court has clarified that at stages of mere police investigation, before the prosecution has begun, the right to counsel does not apply to identification confrontations. *Kirby v. Illinois*, 406 U.S. 682 (1972). In *Kirby*, this Court dealt with an identification which occurred in the police station, pursuant to prompt police investigation of a robbery. On the basis of the suspect's having been in possession of the victim's property, police called the robbery victim to the station. On entering the room where Kirby was sitting at a table, the witness immediately and spontaneously identified Kirby and his companion as the robbers. *Id.* at 685. This Court found that Kirby had not been facing the prosecution at that point, and so did not require the presence of defense counsel.

By contrast, the case at bar involved a series of identifications, each of which was tainted by some form of suggestion. The most flagrant of these suggestive confrontations took place at the Petitioner's first

preliminary hearing, where no counsel was appointed for him, although he was indigent and formal judicial proceedings had begun. The absence of counsel at this crucial physical confrontation with the sole eyewitness contaminated all the identifications which followed.

In *Kirby v. Illinois*, 406 U.S. 682 (1972), this Court held that a police station confrontation was premature for the necessity of counsel. But it based this decision on the principle that the Sixth Amendment guarantees counsel for a defendant once the criminal judicial proceedings have begun–"whether by way of formal charge, preliminary hearing, indictment, information or arraignment." *Id.* at 689. Thus, the rules enunciated in *United States v. Wade*, 388 U.S. 218 (1967), remain vital in those confrontation proceedings which are inherently adversarial.

The Court of Appeals, however, ruled in this case as though *Kirby v. Illinois*, 406 U.S. 682 (1972), had created a Sixth Amendment hiatus after aggressive prosecution begins but before the technical indictment is entered. A plain reading of *Kirby* demonstrates that this Court did not intend such a gap in the Sixth Amendment's protection.

Petitioner's right to counsel had already attached by the time he was confronted openly by the complaining witness in his first preliminary hearing. Further, the deprivation of that right prejudiced him at subsequent court appearances. Therefore, all the in-court identifications of Petitioner which followed the December 21, 1967 confrontation should have been excluded.

Reserving, for the present, the confrontation's impermissible suggestiveness, it is important to examine the facts surrounding this courtroom "showup." Once it is understood that this identification confrontation was

carried out in court, at a preliminary hearing, after a Complaint, by the same State's Attorney who would prosecute at trial, and before the same judge who would later hold Mr. Moore over to the grand jury, it is evident that defense counsel should have been there, too.

On December 21, 1967, James R. Moore had been in custody overnight because he did not have enough money to make bail. (Tr. C-012) That day, he was brought before a Municipal Court judge in Cook County, for his preliminary hearing. (Pet. App. B) Unknown to Moore, the complainant Marilyn Miller was also in the courtroom with a police detective, waiting to identify him. (Tr. 287)

When Petitioner was led out of custody, he thus walked right into the trap of an uncounseled confrontation with the complainant of a sexual assault. (Tr. 287) He was, perforce, standing alone against the State, the very danger of which this Court warned in *United States v. Wade*, 388 U.S. 218, 226 (1967).

Although the decisions of this Court have not yet focused on a factual situation precisely like that in this case, there are numerous opinions among the Circuits which disapprove the practice of showing an unpresented defendant to an eyewitness. A brief overview of these Courts of Appeals cases reveals the scope of the "courtroom showup" problem.

In *Sanchell v. Parratt*, 530 F.2d 286 (8th Cir. 1976), the Eighth Circuit ordered a new trial, and in the event of no retrial, the complete discharge of a Nebraska prisoner who had been subjected to illegal "showups." The defendant in that rape-robbery case had been arrested on an unrelated charge and was being arraigned on that charge when a police officer ushered in the five

rape-robbery victims, to view Sanchell. Sanchell had not been charged with the rape-robbery, and did not have an attorney at the time of the viewing; he, the only tall heavy black male (the description of the offender) in the room, was seated at counsel table with his back to the witn sses. One of the victims identified him afterward, and police arrested Sanchell for the rape-robbery. 530 F.2d 286, 290.

The next time the five witnesses saw Sanchell was at his preliminary hearing on still another charge. His attorney was unsuccessful in getting the rape-robbery witnesses excluded, thus they heard identification testimony concerning the unrelated charge. At the preliminary hearing on the rape-robbery charge which followed, two witnesses believed Sanchell to be the offender. And at trial, three of the five identified him, the third having made her decision to do this without seeing Sanchell again. 530 F.2d 286, 290-291.

The Eighth Circuit held that only the first witness' testimony should have been admitted at trial, since the other two witnesses' identifications were tainted by impermissibly suggestive procedures, and stated:

> The suggestiveness inherent in any showup was surely aggravated here by choosing a forum that would tell the witnesses that Sanchell had been charged . . . The government had no legitimate interest in displaying the petitioner to the witnesses in so suggestive a manner . . . (citation omitted)

Sanchell v. Parratt, 530 F.2d 286, 290 (8th Cir. 1976).

The Sixth Circuit has held that the conviction of an unrepresented defendant who has been viewed at an impermissible suggestive courtroom "showup" must be reversed. *United States v. Luck*, 447 F.2d 1333 (6th Cir. 1971). In that case, the accused, charged with bank

robbery, was brought to court for arraignment; there he was viewed by eleven witnesses to the robbery. The Sixth Circuit found that the identifications which followed this "showup" should have been suppressed, and that the conviction could not be upheld without them. 447 F.2d 1333, 1337.

In 1969, the Court of Appeals for the District of Columbia expressly held that counsel was required for a defendant who was surreptitiously viewed at his preliminary hearing. *Mason v. United States*, 414 F.2d 1176, 1178 (D.C. Cir. 1969). In finding that the erroneous admission of identification testimony based on that "showup" was prejudicial, therefore reversal was necessary, the Court said:

> Assuming that irreparable prejudice may result from unsupervised preliminary hearing confrontations – an assumption apparently compelled by *Wade* – we can think of no sound reason why counsel should *not* be present at such viewing.
>
> Nor do we think it manifest that counsel is not needed to detect and counteract those suggestive influences which remain. The Government relies on the fact that preliminary hearing viewings are matters of public record, lacking in secrecy and capable of reconstruction at trial by enterprising defense counsel. An absence of secrecy, however, is at best a modest benefit if no one is watching.

Mason v. United States, 414 F.2d 1176, 1179, 1180 (D.C. Cir. 1969)

As in all the cases discussed above, no one was watching at Petitioner's preliminary hearing when the detective handed Marilyn Miller a complaint with Petitioner's name on it, and then asked her to identify that named individual when he was brought into court.

(Tr. 287) No one was able to reconstruct that important scene in the confrontation which took place on December 21, 1967, because Petitioner had no attorney there to see any of it.

This Court had found, in *United States v. Wade*, 388 U.S. 218 (1967) that the secret nature of an uncounseled confrontation is responsible for an increase in the dangers inherent in eye-witness identification. This problem is exacerbated when the witness is the victim, whose "understandable outrage may excite vengeful or spiteful motive". *Id.* at 230. Thus, the need for counsel was urgent in Petitioner's case, where all the hazards were present. Yet, no attorney was appointed to observe his preliminary hearing confrontation.

The Second, Third and Fourth Circuits have decided in accord with the Sixth, Eighth, and District of Columbia Circuits that such counsel-less viewings are critical stages in the criminal proceedings. Hence, even if the defendant has a lawyer, the failure to provide true notice of the "showup" to defense counsel is error.

Addressing the notice problem, the Third Circuit in *United States v. Mitchell*, 540 F.2d 1163 (3rd Cir. 1976), observed that it would be appropriate for the Government to notify defense counsel of the existence of any pretrial identifications, as a matter of discovery. There, the defendant had been viewed by three witnesses at his preliminary hearing, but his attorney did not know this in time to effect a remedy. Consequently, the conviction was affirmed due to this procedural omission. In his concurring opinion, Judge Sterm supplemented the Panel's observations:

> A preliminary hearing is conducted to test the propriety of the detention of an accused person. It is not meant to provide a stage on which the

> Government may parade a defendant for surreptitious viewing by witnesses whose only function at the hearing is to watch.

United States v. Mitchell, 540 F.2d 1163, 1169 (3rd Cir. 1976).

United States v. Roth, 430 F.2d 1137 (2nd Cir. 1970), *cert. den.*, 400 U.S. 1021 (1971), was a federal criminal case in which the eyewitness remained uncertain of his identification even after the State arranged for him to see the accused in a "walk through" the courtroom in which Roth was seated at counsel's table. While the Second Circuit found no prejudicial error in this particular instance, it condemned the practice for its failure to give notice to defense counsel. Because of the informality of such procedures, the possibility for subtle suggestiveness increases, and along with it, the need for counsel's presence and awareness. 430 F.2d 1137, 1141 (1970).

The Fourth Circuit case of *Patler v Slayton*, 503 F.2d 472 (4th Cir. 1974), while holding that there was no need to exclude the testimony of a witness who was clearly not influenced by illegal identification procedures, found that the mere presence of counsel was insufficient, and that real notice is required in all confrontations. There, the police had walked the handcuffed defendant past the witness in the stationhouse, and she still did not identify him positively.

In discusssing the need for counsel at such a suggestive confrontation, the Fourth Circuit carefully analyzed and applied this Court's opinion in *Kirby v. Illinois*, 406 U.S. 682:

> The plurality opinion in *Kirby* does not set forth an "indictment" test but refers only to "the initiation of adversary judicial criminal proceedings . . ." There is no question but that Patler had already been served with a warrant charging him with first-degree murder, that he had been confined several hours and that his attorney was present at the police station . . . As to the show-up viewed by both witnesses we find that "adversary judicial criminal proceedings" had been initiated and that Patler was entitled to the informed presence of counsel under *Wade* and *Gilbert*.

Patler v. Slayton, 503 F.2d 472, 476 (4th Cir. 1974).

The instant case supplies an even clearer illustration of the need for counsel at illegal courtroom confrontations than those discussed above. Here, there is no question but that adversarial proceedings had begun, by way of formal charge and preliminary hearing.[3] There was no doubt that Moore was the person to be viewed by the only eyewitness in the same case in which he

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[3] In Illinois, there are three different ways for the prosecution to begin. The first is by Complaint, the second by Information, and the third, by Indictment. (Ch. 38, Ill. Rev. Stat., §111, Proceedings to Commence Prosecution.) A Complaint may be signed by any citizen, and this is usually done through the police, as in the case at bar. The Information is instituted by the State's Attorney's office alone, usually accompanied by affidavit of one who has knowledge that a crime has been committed.

The Indictment by the grand jury may be waived by the defendant, but otherwise is required in all felony cases. If Indictment is not waived, then there must be a Preliminary Hearing on a Complaint or Information. (Ch. 38, Ill. Rev. Stat., §111-2)

This latter situation existed in Petitioner's case and so, conceivably, the State's Attorney could have proceeded without resort to the grand jury, in which case the December 21, 1967 hearing on the Complaint would have been the most critical stage in the prosecution in and of itself.

had been charged. Finally, Petitioner was indigent and therefore had no attorney of his own. Under *Wade* and *Kirby*, Petitioner was entitled to a court-appointed lawyer at that critical confrontation.

In addition to the six Circuits which have condemned "uncounseled showups" as such, two courts have held that there is a right to counsel at pre-indictment confrontations. In *Blue v. State*, ____ P.2d ____, 20 Cr. L. 2361, the Alaska Supreme announced that its State constitution guaranteed a right to counsel at a pre-indictment lineup, absent any exigent circumstances. The Alaska court's reasoning was that the suspect's right to fair procedures generally outweighs the need for prompt investigation. Hence, the presence of counsel at a lineup fulfills three constitutional rights: the right to counsel, the right to due process during the lineup procedure, and the right to confront the witnesses which ensures effective cross-examination.

In that Alaska case, there had been two lineups, one conducted in a courtroom, several days after the suspect's arrest; and the other, in a poolroom, hours after the crime occurred. The court found that there was a right to counsel in the first lineup, which involved no exigent circumstances; but that the interest of prompt investigation outweighed the desirability of counsel in the second lineup. *Id.* at 2361.

The Tenth Circuit, too, has held that there is a right to counsel at pre-indictment lineups, because the same dangers exist, irrespective of the "indictment." In *Wilson v. Gaffney*, 454 F.2d 142 (10th Cir. 1972), *cert. den.*, 407 U.S. 854 (1972), the court stated:

> But surely the assistance of counsel, now established as an absolute post-indictment right does not arise or attach because of the return of an indictment. * * * Every reason set forth by the Supreme Court in *Wade* (Part IV, pp. 228-239) for the assistance of counsel post-indictment has equal or more impact when projected against a pre-indictment atmosphere. We hold that petitioner had a right to counsel at the (pre-indictment) lineup here considered.

Wilson v. Gaffney, 454 F.2d 142, 144 (10th Cir. 1972).

In the case before this Court, the highly improper "courtroom showup" is accompanied by the denial of counsel to a formally-charged defendant who was not yet indicted. The combined effect of these two violations was to subject Petitioner to a highly suggestive and unfair procedure at a time when he was singularly vulnerable. This Court has left ample provision in *Kirby* to avoid this double-edged problem:

> The initiation of judicial criminal proceedings is . . . the starting point of our whole system of adversary criminal justice. * * * It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the sixth Amendment are applicable.

Kirby v. Illinois, 406 U.S. 682, 689-690 (1972).

Based on this reasoning, the plurality in *Kirby* did not apply the exclusionary rule to suggestive confrontations which occurred prior to the placing of formal charges. The test in that case was not pre- or post-indictment, but rather the initiation of "adversary judicial criminal proceedings – whether by way of *formal charge, preliminary hearing, indictment, information,* or *arraignment.*" 406 U.S. 682, 689 (1972). (emphasis added).

On the same principle, namely that a defendant – once he is formally charged – is enmeshed in the criminal judicial process, this Court should find that the pretrial confrontation in the instant case was a critical stage of the prosecution. This determination would assure defendants like Petitioner of the capacity to meet the opposition in the adversarial setting of the courtroom. Not to provide the defendant with an advocate at this stage would fatally tip the balance of our three-part justice system, where there are two adversaries and a neutral judge. 1971 Approved Draft, American Bar Association Standards, *The Defense Function*, §1.1.

In the decision below, the Court of Appeals failed to grasp the essence of the harms done to Petitioner in the hearing at which Moore was confronted, without counsel. Only part of what happened on December 21, 1967, is reflected in the transcript of it, but even that part had its impact. The State's Attorney in Petitioner's case had the witness identify Petitioner just after he had told the judge, in the witness' presence, that the articles stolen from her apartment had been "found" in Petitioner's apartment. (Pet. App. B) This statement – never supported at any later stage in the case – amounted to the State's presenting its evidence at this preliminary proceeding in a manner that suggested – and thus, tainted – the identification. Moreover, the presiding judge did nothing to help restore the adversary balance which had just been destroyed.

It is therefore unquestionable that this first preliminary hearing, at which Petitioner was viewed and then identified by the State's eyewitness was an adversarial proceeding within the standard set forth in *Kirby v. Illinois*, 406 U.S. 682 (1972). Nevertheless, the Court

of Appeals for the Seventh Circuit found that although the uncounseled identification had taken place at the first preliminary hearing, Petitioner had no right to counsel, solely because the confrontation occurred before his indictment. (Unpublished Order, pp. 8-9) But that holding, while purporting to follow this Court's reasoning in *Kirby v. Illinois*, 406 U.S. 682, misconstrues *Kirby* and defies both logic and fact.

In holding that the suspect in the *Kirby* case was not entitled to have an attorney at the police station immediately after his arrest, this Court was applying the principle that defense counsel is guaranteed after the prosecution begins. *Kirby* did not hold that there is a right to counsel until only after the indictment; it held that there is a right to counsel only after formal criminal proceedings have begun. Those proceedings include *formal charge* and *preliminary hearing*, as well as indictment, information, and arraignment. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

In short, even if the Seventh Circuit was correct in finding that the *Kirby* standard of 1972, narrowed the *Wade* approach of 1967, the Seventh Circuit erred in finding the procedure in this case consistent with *Kirby's* proscription. Moore's first preliminary hearing was clearly an adversarial judicial proceeding within the terms of *Kirby*, and he therefore had a right to counsel. *Kirby* did not hold, nor did it imply, that aggressive prosecutorial activity before the indictment could be directed at a counsel-less defendant.

Thus, the Seventh Circuit should have found that Moore had a right to counsel at his first preliminary hearing; and the denial of that right should have been rectified by the exclusion of all in-court identifications which flowed from the counsel-less confrontation.

II.

PETITIONER WAS DEPRIVED OF DUE PROCESS IN THAT IDENTIFICATION TESTIMONY DERIVED FROM AN UNNECESSARILY AND IMPERMISSIBLY SUGGESTIVE CONFRONTATION WAS ADMITTED AT PETITIONER'S PRELIMINARY HEARING AND TRIAL.

In this case, the Court is faced with a pre-trial confrontation which was not only inherently suggestive, but which contained numerous additional elements of actual prejudice. In addition, because the confrontation was staged in the courtroom itself, and counsel was not appointed even then, it constituted a flagrant abuse of the principles enunciated in *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); and *Stovall v. Denno*, 388 U.S. 293 (1967).

A. Petitioner Was Subjected To An Unnecessarily And Impermissibly Suggestive One-On-One Confrontation.

As the Court of Appeals found, the one-on-one presentation of James R. Moore to Marilyn Miller was suggestive. (Unpublished Order, p. 4) The complainant was taken into the courtroom where Moore was to have his first preliminary hearing on December 21, 1967, for the sole purpose of identifying the State's only suspect (against whom she had just been asked to sign a complaint). (Tr. 287) There is no question but that James R. Moore was the defendant in the case being heard in that courtroom at that time; indeed, he was the only black man in the room other than a uniformed

bailiff. (Tr. 80-82) Finally, the witness had been shown the complaint which named James Moore as her assailant. (Tr. 287) After all these patently suggestive elements had been introduced, the witness was finally called before the judge to make an identification in open court. *Before* she was actually asked to make the identification, however, the prosecutor assured the result by incorrectly informing the judge, and the complainant, that property stolen from the complainant had been found in Moore's apartment. (Pet. App. B)

This procedure goes far beyond the highly prejudicial practice, itself widely condemned throughout the Circuits, of having a witness identify a suspect without the suspect's knowledge. *See* discussion, *supra*, pp. 16-23. In that situation, the "showup" is arguably a police mechanism, albeit inappropriately used. But in the Petitioner's case, the prosecution was able, in effect, to get testimony from the witness concurrently with the improper identification procedure and the presentation of very suggestive "evidence." It is this feature of the case which brings into bold relief the true nature of the pre-trial confrontation as a kind of trial in itself:

> * * * The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness – "that's the man."

United States v. Wade, 388 U.S. 218, 235-236 (1967).

Moreover, this is not the type of context, contrary to the Seventh Circuit's indication, where there was nothing a defense attorney could have done to assist his

client. (Unpublished Order, p. 9) In fact, because of the in-court setting, a lawyer would have been ideally suited to grasp the implications of the procedure and to prevent them from developing. In *United States v. Wade*, 388 U.S. at 235-237, this Court enumerated the functions which a defense attorney can perform at a confrontation proceeding. Acknowledging first the accused's helplessness to conduct cross-examination as to the confrontation, the Court said:

> And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context (confrontations), where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself.

United States v. Wade, 388 U.S. 218, 235 (1967).

In the case at bar, if defense counsel had been appointed and then notified that the witness was there to make an identification, he could have asked that Mr. Moore not be brought into the witness' presence alone. Or, if it had been too late for that, the attorney could have moved to exclude Marilyn Miller from the preliminary hearing. If neither of these options had been available, counsel could at least have gotten the hearing continued until he/she could have interviewed the witness. And, assuredly, defense counsel would have objected to the prosecutor's improper remarks as to the "stolen" property. In these ways, the prejudicial confrontation could have been prevented. *See Mason v. United States*, 414 F.2d 1176, 1178 (D.C. Cir. 1969).

None of these alternatives existed for James R. Moore, however, because he appeared in court unrepresented, and the judge never asked if he wanted a

lawyer. (Pet. App. B) Indeed, even if there had not been an illegal "showup", Petitioner was entitled to have an attorney appointed for him in that courtroom, simply because he was facing the prosecutor and the judge for the first time.[4] *Coleman v. Alabama*, 399 U.S. 1 (1970), held that there is a right to counsel at the accused's preliminary hearing. In applying the long-standing rule of *Powell v. Alabama*, 287 U.S. 45 (1932), this court said: "Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution." *Coleman v. Alabama*, 399 U.S. 1, 9 (1970).

Furthermore, in *Kirby v Illinois*, 406 U.S. 682 (1972), in the precise context of identification procedures, this Court specifically mentioned the preliminary hearing as one of the stages at which there is a right to counsel, because adversary judicial proceedings have begun by then: The *Powell* case makes clear that the right (to counsel) attaches at the time of arraignment, and the Court has recently held that it exists also at the time of a preliminary hearing. *Kirby v Illinois*, 406 U.S. 682, 689-690 (1972).

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[4] But even if this Court's decisions were not controlling on December 21, 1967 (See *Adams v. Illinois*, 405 U.S. 278 (1972), the judge was bound to follow the prevailing law of his own state. The Illinois statute on procedure for arrested persons provides that "The judge shall * * * advise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law of this State to represent him . . ." 38 Ill. Rev. Stat., §109(b)(2). Unquestionably, Petitioner should have been so advised at his first court appearance on December 21, 1967; but he was not.

There is nothing in the record to suggest a legitimate reason for the deviation from Constitutionally-mandated procedure in this case. It does not appear, for example, that Mr. Moore had not been formally charged. The record shows the opposite: he had been arrested and processed the night before; his case was set for a hearing in the municipal court; and there was a signed complaint. (Tr. 287) The judge himself confirmed the fact that Mr. Moore had been "charged with rape." (Pet. App. B) And yet no attorney was present to protect the defendant's rights in this patently adversarial setting.

The occurrences at this first preliminary hearing on December 21, 1967 could not help but taint the next hearing which took place over a month later. At that second preliminary hearing, Marilyn Miller again identified Mr. Moore on the record. (Transcript of February 5, 1968 hearing, p. 3) And, finally, of course, by the time of the trial in August, 1968, the complainant would "never forget" Mr. Moore's face. (Tr. 308)

B. There Was No Justification For Staging A One-on-One Confrontation Rather Than A Fairly Constructed Lineup.

The Court of Appeals acknowledged that the procedure described above was impermissibly suggestive, yet it did not find that it deprived Petitioner of due process. In so holding, the Court, did not adequately address the important question of the showup's necessity.

In *Stovall v Denno*, 388 U.S. 293 (1967), this Court set the standard for demonstrating a violation of due

process in identification cases, apart from any violation of the Sixth Amendment right to counsel. *Id.* at 302. The *Stovall* case involved the presentation of a single suspect to hospitalized victim of a recent stabbing. This Court found that the exclusionary rule it had outlined in *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967), would apply prospectively only, hence the rule did not apply to Stovall.

The test which the Court defined for cases in which there was no violation of the right to counsel is whether "the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." *Stovall v. Denno*, 388 U.S. 293, 302 (1967). Accordingly, no violations of Stovall's rights were found, given the "totality of the circumstances" surrounding the "showup," namely that one victim was already dead, and the hospitalized victim might not live long enough to identify or exonerate the police suspect. *Id.*

But in the absence of such emergencies, it has long been recognized that one-on-one identifications are to be avoided. *Stovall, supra*, at 302. These "showups" clearly indicate to eye-witnesses that this is indeed the person whom the police believe to be the offender. Wall, *Eyewitness Identification in Criminal Cases* 26-40. Under such intrinsic pressure to identify *the* suspect, a witness is more likely to make a mistaken identification than if allowed to choose from an array of persons generally fitting the witness' description of the offender. As one Court of Appeals has put it:

> These dangers may result from such diverse influences as the witness's desire to cooperate with

> the police, from his knowledge that he is expected to identify *some one* he sees . . . , *from uncertain recollections of a stranger's face* distorted by a mental focus on particular features, from a generalized feeling of anger or vengeance, from suggestions subtly *planted by the conduct of a nearby policeman* or other witness, from a *calling of the defendant's name* or an overheard description of his offense . . .

Mason v. United States, 414 F.2d 1176, 1180 (D.C. Cir. 1969) (emphasis added)

This goes far beyond the police-arranged "showup," since numerous other elements of suggestion were introduced by the prosecution. There was no legitimate reason for either the police or the State's Attorney to extract identifications from Marilyn Miller in the way they did. First, the State's suspect was already in custody. So, there was no police emergency here, as there was in *Stovall, supra.* Secondly, since police had arrested Mr. Moore at his home (nearly a week after the offense took place), haste was not necessary to ensure his being apprehended. Nothing in the Record indicates that Marilyn Miller was at all indisposed, unlike the hospitalized victim in *Stovall*, hence she could have viewed Mr. Moore as part of a police lineup.

Furthermore, in a city of the size and demographic composition of Chicago, there would have been no difficulty in arranging a fair lineup. Thus, the case is not like *Neil v. Biggers*, 409 U.S. 188 (1972), where the police did have such difficulty. And certainly, the police had enough time to arrange fair identification procedures once they had arrested Mr. Moore; indeed, they could have had a lineup on December 21, 1967, instead of the in-court showup. See Wall, *Eyewitness Identification in Criminal Cases* 52-58. Hence, no

justifications of expediency could have supported the State's choice of a one-man, in-court "showup" in this case, even leaving aside the additional ways in which the prosecutor tainted the "identification."

What does appear from the Record is that the police themselves were not positive of the witness' ability to identify the man they believed was the offender. Marilyn Miller was not willing positively to identify Moore's picture, as that of the assailant. (Tr. 156) It would seem, then, that the police wanted to assure that the witness agreed with *their* choice of James R. Moore as the offender. This is not sufficient justification for a highly suggestive procedure which may result in a case of mistaken identification.

Finally, it was incumbent upon the prosecutor to ensure that the proceedings were fairly conducted. As the only judicial officer present who could have known what the police were doing there that day, it was the State's Attorney's ethical responsibility to minimize the unfairness which inhered in the procedure. Instead, the prosecutor used the situation to his own advantage, thus increasing the imbalance between Petitioner and the State. Pulaski, "*Neil v. Biggers*: The Supreme Court Dismantles The *Wade* Trilogy's Due Process Protection," 26 *Stanford L. R.* 1097 (1973).

Under these circumstances, a finding of a due process denial would seem to be inescapable.

C. The Photographic Identification In Petitioner's Case Was Not An Adequate Independent Origin For The Witness' Identifications.

In a case where the defendant has been subjected to unfair identification procedures, the admissibility of the

identification must be determined by looking to the possibility that the identification had an origin independent of the unfair procedures. *United States v. Wade*, 388 U.S. 218, 241-242 (1967). This is a fact-finding process in which the defense first shows the presence of taint and the prosecution must show, by "clear and convincing evidence" that there is an independent basis for the identification. *Id.* at 242.

In Petitioner's case, the District Judge found that the confrontation procedure was suggestive, but that the witness' ten to fifteen second viewing of her assailant was an adequate independent origin for her identification. (Memorandum of Decision, pp. 9-12) The Court of Appeals, purporting to follow the District Court, held that "the photo spread" was the adequate independent origin, even though the confrontation was suggestive. (Unpublished Order, Pet. App. C, p. 4) However, this photographic "identification" cannot serve as an independent origin because it, too, was tainted by police suggestion.

As this Court has pointed out, photographic identification is a very effective investigatory tool in the modern urban police force. *Simmons v. United States*, 390 U.S. 377 (1968). But it has its drawbacks in terms of inherent suggestivity. While the Chicago police in the instant case relied heavily on the photographic technique, they did not protect sufficiently against its dangers. In cases involving eyewitness identification, there are several danger signals to which courts must be alert; the leading commentator on this subject has described three which are critical in this case. Wall, *Eyewitness Identification in Criminal Cases* 95-122.

First, where the victim of a crime knew the perpetrator before the crime was committed, the victim usually

informs the police of this fact *immediately* upon reporting the crime. Wall, *supra*, 95. In the case at bar, the witness described her assailant to the first police officer on the scene and then to two detectives without ever mentioning that she might have seen him before. It was not until several hours after the crime that she perhaps mentioned the possibility that it was someone she had seen before. Her statement to this effect was never corroborated by any police reports. (Tr. 107)

Secondly, Wall states that witnesses' memories sometimes undergo an "unconscious transference." That is, if a witness has had a limited opportunity to view the police suspect at some time before the crime, but under different circumstances, he/she may recall the suspect's face because it is familiar. The memory would then be of someone other than the actual offender. Wall, *Eyewitness Identification in Criminal Cases* 119-121. Here, the witness had seen Petitioner in a dark bar; hours after she was attacked, she formed the thought that Petitioner and the assailant might be the same man. (Tr. 107)

The third danger signal, also present in this case, is that when the witness and the person identified are of different races, the witness' ability to distinguish the suspect's face from others of that race is substantially reduced. *Id.* at 122. Marilyn Miller is white, James Moore is black, and the man who raped Marilyn Miller was black. These facts militate against the accuracy of the complainant's descriptions and her ability to distinguish between the assailant and any suspects.

Moreover, according to behavioral scientists, once a witness has succumbed to an initial suggestion – whether from mistake or outside sources – there may be no turning back. On the phenomenon of "self-persuasion," it has been said:

> [O]nce a witness' report has been changed according to some minimum inducement and subtle pressure, self-persuasion regarding the truth of statements is likely to occur, and the error may be difficult, if not impossible, to rectify.
>
> And the problem [in police interrogation] is compounded by the fact that repeated questioning is likely to strengthen commitment to a position. (Citations omitted)

Levine and Tapp, "The Psychology of Criminal Identification: The Gap from *Wade* to *Kirby*," 121 U. of Pennsylvania L.R. 1079, 1115-1116 (1973).

In this case, it is evident that there was uncertainty in the witness' mind when she tried to describe her assailant. In fact, her first description of him was hopelessly vague (Tr. 324), and so police filled in the gaps on their own. Quite naturally, as time went on and the police developed their own ideas as to the assailant's identity, the witness' descriptions became more complete and her identifications more certain. (Tr. 105, 107) It is impossible to conclude from these facts that she was not influenced by police and prosecutorial suggestion – subtle or otherwise.

Given the four dangers discussed above and the fact that the members of the jury were never informed of these dangers by way of instructions, one must be wary of the jury's capacity to come to a just conclusion based on the "positive" identification at trial.[5] Considering this set of problems, and the inflammatory

[5] Only the State's Instruction on eyewitness identification went to the jury. (Tr. 625) This Instruction gave no information on the subjects of suggestion and witnesses' susceptibility to it. An appropriate instruction in this case would have been that adopted by the District of Columbia in *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972), which admonished, *inter alia*, that the government must prove identity beyond a reasonable doubt.

nature of the offense involved, it is impossible to discount the importance of every additional bit of suggestion introduced by the police and prosecution. Wall, *Eyewitness Identification in Criminal Cases* 26; *United States v. Wade*, 388 U.S. 218, 229.

Therefore, the photographic identification procedures used in this case should bear much closer scrutiny than they have received below. Contrary to the factual findings of the Court of Appeals and the District Judge, Marilyn Miller did not select James R. Moore's picture from a single spread of several hundred. There were two different photographic displays in this case. In the first one, police showed the witness some 200 pictures, two days after the incident; she says she selected about 30 pictures of men whose builds were similar to those of her assailant. (Tr. 114) But she identified none of them as the assailant. (Tr. 111)

It was only after the police had decided that Mr. Moore was to be their only suspect in the crime that they included his picture in a greatly-reduced (7 to 12) "spread" of photographs. (Tr. 421) It was at this second viewing that Marilyn Miller apparently responded to police suggestion, by picking out the *only picture of a bearded black man.* (Tr. 157) This Court has commented on such procedures:

> [I]mproper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a *brief glimpse* of a criminal, or may have seen him *under poor conditions* . . . [T]here is some danger . . . [which] will be increased if the police display to the witness . . . the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also

> *heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime* (Emphasis added)

Simmons v United States, 390 U.S. 377, 390 (1968).

In the instant case, it is clear that if police had over 200 pictures on a Saturday, and the witness could tell them at that time that thirty of them fit the description of the offender, then they could find at least two or three other suitable photos to include in their spread on the following Monday or Tuesday. But they did not do this; they chose instead to show only one picture which fit the description the witness had given. (Tr. 157) Herein lies the unnecessary suggestiveness of the photographic identification. Thus, the "independent source" relied on by the courts below was itself tainted. The identification procedure in this case began with the vague description of a black assailant, given by a white complainant, to the first policeman on the scene. Later that day, the first description was augmented by the witness' statement that her assailant – who had put on a mask before the attack – had a beard. Still later that day, or perhaps on another day entirely, the witness stated she had seen the bearded assailant the night before she was raped. When the complainant could not make a photographic identification on the first try, the police set up a photographic "display," from which she could not help but pick Moore's picture because it was the only picture of a bearded black man. To shore up the still-tentative identification, the police arranged to have the witness see Moore in person, in court, and without a lawyer. The prosecutor completed the process by implying that Moore had stolen her property after assaulting her.

It is no wonder that with all these suggestive influences, the witness' identifications became more and more positive as time went by – a time during which no other suspects were shown to her. The identification procedure ended, as it inevitably must have, in the witness' absolutely "certain" identification of Moore as the man whose face she would never forget. Therefore, the initial identification was irremediably infected, both by the absence of counsel at the crucial confrontation of December 21, 1967 and by the numerous elements of suggestion which pervaded the entire identification procedure.

D. Exclusion Of The Identification Evidence Was The Appropriate Remedy For The Deprivation of Petitioner's Rights Under The Sixth And Fourteenth Amendments.

In *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967), this Court fashioned an exclusionary remedy to remove the taint of counsel-less identification procedures. Finding that mere exclusion of evidence of a counsel-less lineup or "showup" itself would derogate from the right to a fair trial, the Court held that the proper solution was to exclude an in-court identification which actually flowed from the improper confrontation. *Wade, supra*, at 241. Hence, where a counsel-less lineup or "showup" has taken place after the prosecution has begun, the initial identification and subsequent in-court identifications based thereon must be excluded unless the State can show by clear and convincing evidence that an independent basis existed for the identification. *Id.* at 240; *Kirby v. Illinois*, 406 U.S. 682 (1972).

In 1972, this Court decided *Neil v. Biggers*, 409 U.S. 188 (1972), a case which raised a due process challenge to a police station "showup" involving a corporeal and voice identification. This Court held that the identification by the witness was reliable in spite of the unnecessarily suggestive out-of-court identification procedure. *Id.* at 201.

In so holding, the Court indicated that a strict exclusionary rule would not be appropriate for cases arising before June 12, 1967, and employed a "totality of the circumstances" test for the admissibility of identification in these "pre-*Stovall*" cases. *Id.* at 200. But *Neil* by no means foreclosed a strict exclusionary rule as a deterrent to police and prosecutorial improprieties which occurred after June 12, 1967. Hence, there has been a division among the lower courts as to which exclusionary rule does apply to "post-*Stovall*" cases.

One interpretation, exemplified in *Brathwaite v. Manson*, 527 F.2d 363 (2nd Cir. 1975), *cert granted, Manson v. Brathwaite*, ____ U.S. ____, 96 S.Ct. 1737 (1976), is that a strict exclusionary rule should apply to those cases arising after June 12, 1967. The other interpretation, which appears in *United States ex rel. Kirby v. Sturges*, 510 F.2d 397 (7th Cir. 1975), *cert. den.*, 421 U.S. 1016 (1975), is that there should be no strict rule of exclusion for such cases, but that each identification should be tested individually for its reliability, under the "totality of circumstances." But even in *Kirby v. Sturges, supra*, the Seventh Circuit recognized that a simple exclusionary rule would be salutary for its deterrent effects and its facility of application; therefore, a strict rule would minimize the danger of convicting the innocent. *Id.* at 405. *See* also, Pulaski, "*Neil v. Biggers*: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection," 26 Stan. L.R. 1097 (1974).

Applying the strict exclusionary rule to Petitioner's case is justified by the fact that police and prosecutors were on notice, in December 1967, that suggestive confrontations were disapproved and that their products would be inadmissible. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 2630 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967). That rule would require the exclusion of the first preliminary hearing identification, the second identification at the probable cause hearing, February 5, 1968, and the identification at trial, simply because the State's procedures violated the Sixth and Fourteenth Amendments. *See Brathwaite v. Manson*, 527 F.2d 363, 371 (2nd Cir. 1975), *cert. granted, Manson v. Brathwaite*, ____ U.S. ____, 96 S.Ct. 1737 (1976). *See* also, Grano, "*Kirby, Biggers* and *Ash*: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?" 72 Mich. L.R. 717 (1974).

The primary purpose of a strict exclusionary rule – deterrence of misbehavior by the State – would obviously be served in the case at bar. The suggestiveness in this case may have been initiated by police alone, but their continuing influence was strenthened by the apparent approval it was given by the State's Attorney on December 21, 1967. The ultimate abuse was the prosecutor's contemporaneous use of the cumulative police suggestion and his own in-court implications, in obtaining an identification. This is the type of State action which can be reached only by means of a broad rule, uniformly applied.

A strict exclusionary rule applied in Petitioner's case would also remove at least part of the substantial risk

of misidentification inherent in such cases. Because the strict rule would protect against the danger of a jury's convicting an innocent person on the basis of unreliable eyewitness testimony, if applied in Petitioner's case it would have minimized the dangers created by the jury's ignorance of the unreliability of eyewitness identification. Thus, there would have been no harm in the judge's failure to thoroughly instruct the jury as to Marilyn Miller's own capacity to identify her assailant.

However, if this Court finds that a strict exclusionary rule is not mandated by the Fourteenth Amendment, then the identification testimony in Petitioner's case remains subject to the "totality of circumstances" test. *Neil v Biggers*, 409 U.S. 188 (1972). Even under this test, Petitioner was entitled to have that testimony excluded.

Shifting the focus from the admittedly improper police/prosecutorial procedures in this case to the reliability of the eyewitness' independent identification, it becomes necessary to examine the possibilities for irreparable misidentification. The facts adduced at the State court trial demonstrate a substantial likelihood that the complainant was led into mistakenly identifying the Petitioner as her assailant, and that the police compounded the error by consistently employing suggestive procedures.

When Marilyn Miller was attacked, she had no more than ten or fifteen seconds to see the assailant. (Tr. 104) This viewing took place in a room which was darkened, apparently, for sleep. (Tr. 101-102) A third significant fact is that the complainant had actually been asleep when she first saw the shape of a man whose body "just filled up" her bedroom doorway (Tr. 213), and who carried a knife, awl, or icepick. (Tr.

212) Moreover, the complainant was white and the assailant was black. (Tr. 125)

Given these conditions, it would be virtually impossible for a reliable identification to emerge. The extremely limited opportunity of a sleep-fogged victim to view the potential perpetrator of a sexual assault is hardly a basis for a positive and accurate description of that assailant. And in the case at bar, it did not produce such a description.

When the first policeman arrived at the complainant's apartment, moments after the rape, Marilyn Miller could not give details about the man's height, weight, voice, or facial features. (Tr. 226) She could only recall the things which impressed her most – his large size and his race. (Tr. 324)

But the Record is silent as to what happened to Marilyn Miller's recollection between that time and several days later when police had settled on Petitioner as their prime suspect. We have Ms. Miller's testimony that she gave police new information about the assailant later on the same day. (Tr. 107) Yet the police never bothered to include this new information in their official report, if in fact they received it. (Tr. 404) One can only speculate, therefore, as to what might have refreshed (or created) the witness' memory, and when that happened.

However, even if we view this situation in the light most favorable to the State, the possibility persists that Marilyn Miller "remembered" Petitioner's fact because it – and not the assailant's – was familiar. As Patrick Wall has pointed out, it is not at all uncommon for a witness unconsciously to substitute a face previously seen for the face of the actual criminal. Wall, *Eyewitness Identification in Criminal Cases* 119-121.

This phenomenon could easily have been responsible for Marilyn Miller's feeling – hours or perhaps days after the crime – that the assailant had been a different large black man. After all, she had seen Petitioner in a bar the night before the attack, and they had spoken only briefly, without exchanging names or addresses. (Tr. 115-118) And, too, she testified that Petitioner's remarks had offended her at that time (Tr. 119); quite probably this left an unpleasant memory of him in her mind. Then when she was raped the next day, it eventually occurred to Ms. Miller that it might have been the same man whose words had disturbed her the night before.

While only experts in mental analysis could resolve the question of "transference" discussed above, Petitioner's alibi evidence at trial lends some weight to it. In this case, the defense turned on the fact that James R. Moore was more than six miles away from the scene of the crime, in the cafeteria of the downtown university where he was a student, at the time Marilyn Miller was raped on Chicago's South Side. (Tr. 473, 384) The alibi witnesses were apparently disinterested persons who were not discredited in any way during cross-examination. (Tr. 473-495) In the face of this evidence and the testimony that the fingerprint found at the scene was not Moore's (Tr. 356), it strains the imagination to accept, untested, the witness' identification of Petitioner as the man she saw for only ten or fifteen seconds in a darkened room.

The procedures actually followed by the police in their use of photographs to identify Petitioner were discussed above, (See pp. 33-39, *supra*.) It is important to recall at this point that the complainant did not make an identification from the first set of pictures she

saw. (Tr. 110) That is, when her memory was its freshest, and presumably not yet affected by any police suggestion, she could not identify an assailant.

But at the next showing of pictures, once police had definitely chosen Petitioner as their only suspect, Marilyn Miller did select his picture. (Tr. 111) Since *no* police photograph shown to the witness was ever marked or noted, there is only the detective's subjective memory on which to rely as a test of the witness' own memory. The two sources contradict each other on all points but one: the Petitioner's photograph was shown and selected. This was probably inevitable; it was the only picture of a bearded black man.

To summarize the "totality of circumstances" which militate against the reliability of the identification in this case:

1. There was only a restricted opportunity to view the actual assailant (10 to 15 seconds in an unlit room).
2. The witness' attention was divided even during that time (she could not describe the man's face, but could describe with some accuracy the weapon he carried), and she was unable to see anything during the attack itself.
3. The witness gave only a very general on-scene description which was capable of fitting innumerable black men.
4. A full week passed between the occurrence and the confrontation on December 21, 1967; the witness saw no other suspects in person during that time.
5. The witness' apparent certainty of her identification at trial cannot be judged without considering the various elements of suggestivity which preceded it in a series of progressively reinforcing instances of police and prosecutorial impropriety.

These circumstances point directly to a substantial likelihood of misidentification. And when they are viewed in light of the evidence presented in Petitioner's defense, it is manifest that inclusion of the identification testimony significantly detracted from his right to a fair trial. For without the seemingly positive identifications which the witness provided in court, a jury could not have found Petitioner guilty beyond a reasonable doubt. Therefore, a proper application of the *Neil v Biggers, supra,* test, would have impelled the Court of Appeals for the Seventh Circuit to find that Petitioner was deprived of due process as a result of the erroneous admission of all identification testimony at the trial. It was error for the Court of Appeals to have found otherwise, and its decision should therefore be reversed.

III.

SINCE PETITIONER WAS DENIED COUNSEL AT AN IMPERMISSIBLY SUGGESTIVE CONFRONTATION WITH THE ONLY ADVERSARIAL EYEWITNESS, IT WAS PREJUDICIAL ERROR FOR THE TRIAL COURT TO DENY APPOINTED COUNSEL FREE TRANSCRIPTS OF THE FIRST PRELIMINARY HEARING, AT WHICH THE CONFRONTATION OCCURRED, AND OF THE SECOND PRELIMINARY HEARING, AT WHICH THE EYEWITNESS IDENTIFIED PETITIONER.

On December 21, 1967, Petitioner appeared in court, where formal charges were read to him, and in the presence of the complaining witness, the State's Attorney volunteered the following remarks:

> "There's further investigation being conducted of prints being found on the scene. This is an allegation of rape and deviate sexual assault. It's a home invasion of an apartment in Hyde Park and the victim was raped and forced to commit an oral copulation. Taken from her was a guitar and other instruments. When the defendant was arrested upon an arrest warrant signed by the Judge of the Court, the articles, the guitar and other instruments were found in the apartment, as were the clothes described of the man that attacked her that day. *Do you see the man in Court today that committed these acts upon your person*?

Transcript of Proceedings, December 21, 1967. (Emphasis added)

The assertions and implications contained in the State's Attorney's speech in front of the complainant were totally unfounded. The "print" which was found was proven *not* to be that of Petitioner (Tr. 356); this, in a physical assault where there was no indication that the assailant wore gloves. No evidence whatsoever was adduced at trial to indicate either that the "instruments" taken from Moore's home belonged to the witness, or that Moore's clothing had been worn by the assailant. (Tr. 378) But these improper remarks were entered into the record, and deliberately or otherwise, prompted the witness' inevitable indicating of Petitioner as "the man."

Neither before, during, or after the witness testified at trial, did the defense ever see the transcript of this proceeding. (See Affidavit of Frederick Cohn, attached to Petitioner's Reply Memorandum in the District Court.)

On February 5, 1968, this same eyewitness testified at Petitioner's hearing on probable cause, and again

identified Petitioner as her assailant. (Transcript of Proceedings, February 5, 1968, p. 2) This proceeding, too, was transcribed by a court reporter.

On February 14, 1968, Petitioner was indicted by the grand jury, after proceedings in which the complainant made a third identification of Petitioner. (Tr. 241-245) Minutes were taken by a court reporter at that hearing, as well.

It was not until April 5, 1968, that the court appointed Frederick F. Cohn to represent Petitioner at trial (Tr. C-029) When Mr. Cohn made his first request for preliminary hearing transcripts, the trial court denied it at that time but promised to have the transcript available at trial. (Tr. 10) Overruling counsel's argument that this Court's decision in *Roberts v. LaVallee*, 389 U.S. 40 (1967) controlled, the trial judge stated that Illinois law did not entitle an indigent defendant to a free transcript of the preliminary hearing. (Tr. 11) Mr. Cohn made no fewer than three requests for transcripts of all preliminary proceedings, before, during and after the trial. (Tr. 9-11; Tr. 254-260; Tr. 677) The trial court denied all of his requests except that for grand jury minutes (Tr. 254), and neither the court nor the State's Attorney ordered the preliminary hearing transcripts to be prepared for use at trial. (Tr. 255-260) Petitioner was indigent and could not afford to pay for any transcripts himself. (Tr. 10)

The lower courts in this case have uniformly found that the denial to Petitioner's appointed counsel of pre-trial hearing transcripts deprived Petitioner of Equal Protection under the Fourteenth Amendment. However, they have decided that this error was harmless beyond a reasonable doubt, on the grounds that the transcripts

contained nothing of any value to the defense. [See Unpublished Order; Memorandum of Decision; *People v. Moore*, 51 Ill. 2d 79, 281 N.E.2d 294 (1972)]

In 1968, when Petitioner was tried, it was just as true as it is today that inability to pay the costs of defending a prosecution should not deprive a defendant of the capacity to do so. *Gideon v Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Powell v. Alabama*, 287 U.S. 45 (1932). By that time, this Court had specifically held that the denial of a preliminary hearing transcript to an indigent defendant deprived him of Equal Protection:

> Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution.

Roberts v. LaVallee, 389 U.S. 40, 42 (1967).

Thus, the lower courts apparently followed the rulings of this Court in determining that denial of free transcripts was a denial of Equal Protection. However, in holding that this denial constituted harmless error, the lower courts failed to consider the impact of the various pretrial hearings, in light of the suggestiveness issue. These records of the events preceding Petitioner's trial were the *only* tools which his belatedly-appointed attorney could have used in an effort to prove the taint of suggestiveness on the previous identifications, and to impeach the sole eyewitness. Thus, the denial of these transcripts constituted a violation of Petitioner's right to the effective assistance of counsel as guaranteed by the Sixth Amendment and the due process clause of the Fourteenth Amendment. *United States v Wade*, 388 U.S. 218, 232 (1967); *Powell v Alabama*, 287 U.S. 45, 69 (1932).

The fact that Petitioner did not have a lawyer at his first confrontation with the complainant caused him substantial prejudice, for the several reasons outlined, *supra*, pp. 12-38. The trial court then compounded the prosecution's error in holding a suggestive confrontation: first by not appointing counsel at that time, and later, by not providing the defense a transcript of the proceeding. Under these special circumstances, it was clearly not harmless error for the trial court to have denied Petitioner, an indigent, the right to use the transcript of the December 21, 1967 hearing. *United States v. Wade*, 388 U.S. 218, 236 (1967).

As to the transcript which contained the complainant's sworn testimony (as opposed to her unsworn identification statement of December 21, 1967), Petitioner should have had this document for general impeachment purposes at the trial. As a criminal defense attorney in a case where the eyewitness' credibility was so important, potential impeachment was part of Mr. Cohn's duty to investigate:

> The relationship of effective investigation by the lawyer to competent representation at trial is patent, for without adequate investigation he is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial . . .

American Bar Association Standards for Criminal Justice, *The Defense Function*, §4.1, p. 227 (1971 Approved Draft).

In addition to its value for impeachment, this transcript contained another identification of Petitioner which was arguably tainted by the suggestive showup and suggestive remarks of the prosecutor which preceded it. This Court's holdings in *United States v. Wade*, 388 U.S. 218, and *Gilbert v. California*, 388 U.S. 263, demand no less.

At every step in the judicial criminal process in this case, Petitioner faced a confrontation with the one eyewitness against him. Finally, when Petitioner's appointed trial attorney attempted to reconstruct these events, the court kept secret from him all that had gone before. (Tr. 9-11, 254-260) Thus, on the crucial question of identification, Petitioner was consistently deprived of the effective assistance of counsel.

The Seventh Circuit stated that it may not have been important for the resolution of the question of innocence, *per se*, that the complainant had made prior inconsistent statements and that the State's Attorney had made untrue statements. (See Unpub. Order, 7) Even assuming this were true, insofar as there was a substantial likelihood of mistaken identification in this case – as established by the highly suggestive procedures used – it was very important for trial counsel to be able to cross-examine the witness regarding *any* identification made.

In not recognizing this relationship between the ultimate factual issue and the issues on which it turned, the lower courts misperceived the transcripts' significance. Every bit of Marilyn Miller's testimony would have been useful in Petitioner's defense, because the entire case turned on the identification, and the probability of mistaken identification would have rendered impossible a finding of guilt beyond a reasonable doubt. Each time Marilyn Miller identified Petitioner as the assailant, under the reinforcing influence of police and prosecutorial suggestion, she became firmer in her belief that he was the man. Yet, because the suggestion factor also increased as time went on, Petitioner's only weapon was his attorney's ability to test the identification through cross-examination.

This Court has made it clear, time after time, that meaningful cross-examination is the heart of the effective assistance of counsel. *Pointer v Texas*, 380 U.S. 400 (1965); *Davis v Alaska*, 415 U.S. 308 (1974).

In *Pointer, supra*, this Court held that the Sixth Amendment right to confrontation was so fundamental as to be applicable to the States through the Fourteenth Amendment:

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.
>
> [T]he decisions of this Court and other courts throughout the years have constantly emphasized the *necessity for cross-examination as a protection for defendants in criminal cases.*

Pointer v. Texas, 380 U.S. 400, 404 (1965). (Emphasis added)

Petitioner was plainly deprived of this protection to the extent that his attorney was not provided with the witness' previous sworn statements and the unsworn statements from which they might have derived. This deprivation violated the Sixth Amendment and the Fourteenth Amendment.

In order for the lower courts to have found the acknowledged constitutional error in the instant case to be harmless beyond a reasonable doubt, they ignored the fact that the harm was not just the failure to provide a transcript to the defense at the trial itself. Contrary to the trial judge's assurance that the preliminary hearing transcript would be available to defense counsel at the trial, the judge never ordered its preparation, even after defense counsel requested it a second time. (Tr. 254-260) This second denial occurred

while counsel was engaged in the cross-examination of Marilyn Miller, the only eyewitness in the case. Thus, counsel, who had relied on the court's promise of the witness' prior statement for use at this very point, was forced to attempt impeachment of a witness whose prior statements he had never even seen. These facts are not consistent with a conclusion of harmless error beyond a reasonable doubt, in this case, where the sole eyewitness' credibility was a crucial matter.

Therefore, the decision of the Court of Appeals for the Seventh Circuit, that the denial of free transcripts to Petitioner was harmless error, is erroneous and should be reversed.

CONCLUSION

For all of the foregoing reasons, it is submitted that the judgment of the United States Court of Appeals for the Seventh Circuit which affirmed the dismissal of the petition for a writ of habeas corpus should be reversed, and the writ granted.

Respectfully submitted,

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